

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

77-6148,6154

To be argued by
MAURICE N. NESSEN

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

DU PONT GLORE FORGAN INCORPORATED, *et al.*,
Plaintiffs-Appellants,

—against—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Defendants and Third-Party
Plaintiffs-Appellees-Appellants,

—against—

UNITED STATES OF AMERICA,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DUPONT GLORE FORGAN INCORPORATED, :
et al., :

Plaintiffs-Appellants, :

- against - :

AMERICAN TELEPHONE AND TELEGRAPH :
COMPANY, et al., :

Docket Nos. 77-6148
77-6154

Defendants-Appellees :
and Third-Party Plain- :
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- against - :
:

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Third-Party Defendant- :
Appellee. :

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REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Preliminary Statement

Plaintiffs respond to the Bell System defendants' brief¹ and to the brief of the third-party defendant, the United States of America, first, by providing a Guideline to the errors and omissions in the Bell System's Statement of the Case; second, by treating

1. We employ here the same abbreviations we used in our main brief, which we cite as "Pl. Br." In addition, "Def. Br." will refer to the Bell System defendants' brief and "Gov. Br." will refer to the brief of the United States of America, which henceforward we shall call "the Government." All emphasis in quotations is supplied.

with the Bell System's Points I and II; and third, by dealing with its Point III together with the entire brief of the Government.

The Guideline to the Bell
System's Statement of the Case

The Bell System defendants claim that our main brief's presentation of the facts was "highly selective and incomplete" and promise to provide "a complete summary of the material facts" (Def. Br. 2-3). Their claim is untrue. Their promise is unkept.

Defendants' Statement of the Case is an encomium to the efforts of the District Court coupled with a very cautious recapitulation of only those facts and those findings of the District Court favorable to them. It slices reality into segments (euphemized and clouded by jargon) that deny the reality of the Bell System and the way that "system" created and maintained services and rate structures. Defendants dodge most of the specific evidentiary facts in the record, particularly where we have challenged a finding of the District Court. Unlike our presentation, their Statement shies from exact quotations from documents or the transcript and summarizes or restates the evidence in ways that subtly change meaning. And constantly they fail to place statements, documents and testimony in the true context of this case: the myriad ties that bind the Bell System; the perceived need to abide by AT&T's views; the resulting agreement to agree.

Before going step-by-step through the Statement, we give one example out of sequence to illustrate these observations.

The Ichter Example

As supposed proof that the defendant operating companies acted independently in unbundling their Centrex rates, the Bell System's brief notes that one of their witnesses, Arthur X. Ichter, testified that he "independently decided that defendants The Bell Telephone Company of Pennsylvania and Diamond State Telephone Company should file revised tariffs before he learned that AT&T was considering the same step" (Def. Br. 29-30). Defendant's brief later says that this testimony illustrated "vividly" the "independent judgment" exercised by the Bell System operating companies (Def. Br. 36).

But Mr. Ichter made no "independent" decision that bound any operating company. He had no such power. He was, in truth, merely the communicator of AT&T's decision to those who officially bound the two Bell companies, his corporate superiors who themselves never testified at trial. The documents expose this reality. Mr. Ichter's own contemporaneous memorandum to a superior, written August 16, 1971, states that he and a colleague met with AT&T officials and "obtained clearance to file our proposed Centrex revisions in Delaware promptly" (E1361). He was advised at that meeting that "Kemp will recommend basically the same sort of Centrex restructuring Systemwide" (E1361). This "clearance" and

2. As was typical in the Bell System's case, Mr. Ichter's trial testimony varies the revealing language ("clearance") of the contemporaneous document to euphemisms and jargon. See, e.g., 1459a-1460a.

"advice" was absolutely critical for Mr. Ichter's corporate superior, who wrote in a contemporaneous document that the Bell System brief does not quote:

"[AT&T] is moving ahead with a letter recommending Systemwide conversion to the two-rate approach. Their letter should be circulated prior to our filing date in Delaware. Accordingly, they will be committed to this rate plan and see no need for delaying a Pennsylvania filing" (E1363).

The message in this document is unmistakable; the Bell System's slice of reality about Mr. Ichter is not real corporate life. Here, in context, is the picture of how the "system" worked: none of the operating companies would act before AT&T was "committed" to the change "systemwide" and none would act if AT&T saw any need for delay. Mr. Ichter, whom we assume is covered by the lower court's general finding of witness credibility (164a), can only be, at best, self-deluded.

And so it goes in all of the Bell System Statement of the Case, as we are about to show.

3

"A. The Parties" (Def. Br. 3-5)

Defendants' description of how the Bell System operated confirms one essential point: operating company officials instinc-

3. To facilitate use of this Guideline, we quote all or part of the section headings of defendants' Statement. Whenever we cite our main brief we mean to incorporate the references to the record that appear there.

tively and habitually looked to and depended upon word and approval from AT&T. As the court below found, "AT&T's advice is usually followed by the operating companies, with variations to account for local situations" (107a).

Strikingly omitted from defendants' "complete summary * * * of the findings made by the District Court" (Def. Br. 3) are two findings that defog the jargon of "advice," "recommendation," "staff resource," etc. First, transfers of personnel within the Bell System are quite common, with employees moving to and from among AT&T and the ⁴ operating companies (107a). Second, the operating companies could not elect a president without the concurrence of AT&T's board chairman (107a).

Consider then the self-characterized "Bell System," link (i) the "advice," the "staff resource", the meetings, the continuing flow of information, the stock ownership and the AT&T concern about multistate customers with (ii) the exchange of personnel, desires and fears about advancement and the power of AT&T over promotion and transfer and, we submit, there can be no doubt (even absent those telling slips in contemporaneous documents) that a strong call and explanation of need for "uniform" conduct among all defendant operating companies is to be heard in the Bell System for what it has to be -- and obeyed.

4. Indeed, defendants' trial witnesses, as noted in our main brief, all followed these Bell System lines (Pl. Br. 11 n.4).

"B. The Initial Centrex Tariffs" (Def. Br. 5-10)

At trial, we established to the satisfaction of the lower court several key facts about the history of the Centrex package rate:

1. In late 1960, AT&T created a task committee to develop the fundamentals of Centrex service (135a).
2. In 1961, AT&T sent to each operating company -- all of whom look to AT&T for guidance -- voluminous material containing the "basic principles and procedures which it would seem feasible for all Companies to follow in establishing rate treatment for Centrex Service" (107a, 135a).
3. The elements stressed by AT&T for Centrex service included a package rate and a reservation to the telephone company of the choice of serving method (Centrex-CU or Centrex-CO) (138a-140a).
4. The written materials stressed that the operating companies should adopt a uniform rate structure, including the package rate; this stress on uniformity was repeated at May 1961 meetings attended by all defendants (135a-136a, 140a).
5. Beginning in 1961, each defendant operating company introduced Centrex service, including the package rate; some even after Congress passed the Reduction Act that AT&T had successfully lobbied for (141a, 161a, 164a).

Defendants do not challenge these basic facts, although they shun all the exact quotations from the contemporaneous documents that speak eloquently of agreement and "hard-to-overemphasize" conformity (compare Def. Br. 7-10 with Pl. Br. 13-17). Instead, defendants paint a broad picture of AT&T and the Bell System acting unselfishly for the benefit of their customers and setting up a rate structure for only one of the several reasons they actually had; they talk

of operating companies independently making decisions "as to the type of tariffs" without noting the crucial areas of conformity; they latch on to one of the District Court's generalized findings without revealing that it is contradicted by other specific findings and, indeed, by all the evidence in the case (Def. Br. 4-5, 9).

Thus, we are told that AT&T wanted to reserve for each operating company the choice of serving method (Centrex-CU or CO) because not to do so "would increase its average revenue requirements (and therefore its rates) for Centrex service" (Def. Br. 7). While that inference may be wrenched from a patching together of several documents, another very pointed and more logical explanation appears explicitly in the materials that AT&T sent in 1961 to all the operating companies:

"[I]t could be very unwise to promote any idea of differences which would encourage customers to 'pick and choose', quite possibly to our economic detriment in a significant number of cases. Desirably, we should endeavor to keep ourselves as free as possible to determine the serving method in all cases" (E120).

AT&T is, after all, a money-making operation concerned with maximizing its earnings for each shareholder (E62). Defendants' brief here again denies reality.

Defendants also make much of the District Court's finding that a "uniform Centrex rate structure was desired, not to fix

the price for Centrex service, but to enable it to be provided as efficiently as possible and to facilitate marketing" (Def. Br. 9; 171a). The defendants argue that this finding eliminates our claim that "the purpose" of the Centrex rate approach was to "narrow price differentials between operating companies in different states" (Def. Br. 8). There are several things wrong with their argument.

We did not say the purpose of the recommended Centrex approach was to narrow price differentials. But we did say that the 1961 materials AT&T sent to the operating companies proclaimed that the Centrex rate approach would narrow price differentials between the operating companies (Pl. Br. 16). They did just that:

"[U]niform application of the principles and methods can be expected to result in schedules sufficiently alike to seem reasonable to customers having requirement for the service in a number of [Bell] Companies" (E105).

Thus, if the trial court's finding were meant to exclude the fact that uniformity of rate approach was trumpeted as a way to narrow price differentials, it was starkly in error.⁵

5. On recross-examination, AT&T's Kemp was as explicit as AT&T-jargon allowed him to be:

"But I would add that if the companies had followed the recommended approach outlined in the binder furnished by the service cost people which identified the kind of plant that would be used, the way in which the costs there would be brought forward into the pricing structure, to the extent that local factors were introduced, that would introduce the only differences, and you would get a relatively uniformly-looking structure, and the levels would not be what I would consider to be too far apart" (1319a).

In fact, such an exclusionary finding does not accord with the trial court's findings in an earlier section of the opinion or with the contemporary documents that back those earlier findings. Earlier, the lower court found that the purpose of the Centrex rate structure was "to improve company earnings on PBX facilities", to "[f]oster Systemwide uniformity of rate approach within all practical limits"; and to "relate Centrex rates to the rates for existing services to which it was similar" (137a-138a). And most significantly, the trial court found that the operating companies were told "to follow the proposed rate treatment as closely as possible" because: "Centrex customers often had installations in more than one state, and it was felt that these companies would find it easier to understand Centrex and would be less likely to complain if the rate treatment was similar in each jurisdiction" (141a); and, of course, customers complain most about prices. The documents all bolster these earlier findings of the District Court (E105, E150, E322; see also, 1304a-1305a, 1318a-1319a).

In sum, it denies reality to say that price structure, price differentials and price levels -- profits -- did not play a significant part in the establishment of the rate structure for Centrex. Insofar as a District Court finding is to the contrary, it is "clearly erroneous" and is contradicted by earlier findings.⁶

6. Defendants provide only one reason for the package rate itself -- simplicity (Def. Br. 7). Again, the contemporaneous and obviously well considered documents sent out by AT&T provide a plethora of additional reasons. (see, e.g., E152)

Finally, defendants point to certain differences among the Centrex tariffs of the defendant operating companies (Def. Br. 10). We have never denied that there were differences in the amount of money charged in the various states or in the secondary service features offered by the various companies; we have disputed the significance of these differences (1598a-1601a). Each defendant operating company introduced Centrex service with a package rate and, where local conditions made possible a choice of serving method (Centrex-CU or Centrex-CO), each reserved that choice unto itself (161a). It was only beyond these "basic principles and procedures" (135a) that variations existed (161a-162a). They had to exist because there were different costs, different historic rate bases and different attitudes in the states. AT&T specifically recognized -- as the lower court found -- that minor variations for local circumstances would be made (140a-141a); that was part of the understanding. The sum of it is that the Bell System companies set (if you will, fixed) prices the only way their monopoly situation in the states allowed them.

"C. The Regulation of Centrex Service
by State and Local Regulatory
Authorities" (Def. Br. 10-13)

Defendants, as they did below, lay stress on the presence of state and local regulatory authorities. While defendants call the regulation of Centrex service "a fact of central importance in the present case" (Def. Br. 10), the lower court made only passing

reference to the function of these regulatory authorities (174a-175a), and its holding in no way turns on this issue. Nor could it have.

Whatever may have been the role of regulatory authorities in the development of the Centrex rate structure -- and it was minimal --⁷ the question whether Centrex charges should be separated in order to provide the tax exemption for "private communication service" clearly fell between the state and regulatory agencies, on one hand, and the Government, on the other. No state or local regulatory commission was ever presented with or ever considered the question prior to mid-1971, after AT&T had decided it was time to⁸ unbundle (464a-466a; see E1410).

7. The package rate was, in keeping with AT&T's direction, introduced by all defendant operating companies as part of the initial Centrex tariffs (161a). While such tariffs had to be filed with regulatory authorities, it was a well known fact of regulatory life that tariffs for new service offerings -- as opposed to revised tariffs for existing services -- were generally allowed to become effective with only a minimal level of regulatory scrutiny (1256a). By contrast, when a modification was to be made to an existing service offering, the various state procedures intensified.

This disparity of regulatory scrutiny explains why defendants were concerned in 1964-65 about changing their Centrex rates to accommodate a tax advantage. It would have exposed Centrex for the first time to real regulatory review in every jurisdiction where it was then offered, with customers being a "readymade" body of potential objectors (1256a).

8. Jamestown Telephone Corp., N.Y.P.S.C. Case No. 26734, Nov. 12, 1976 (E1459), cited by defendants (Def. Br. 13 n.) is irrelevant; as the District Court stated: "It has absolutely no significance as far as this case is concerned, as far as the issues as framed in this case. This is four years after the last event that has been referred to" (1164a). Defendants' "complete summary" omits this finding, too.

"D. The Federal Excise Tax on Centrex Station Charges" (Def. Br. 14-17)

Defendants' review of the federal excise tax laws during the relevant period fails to mention a "fact of central importance" -- the constant and effective lobbying of AT&T (Pl. Br. 19-20, 77-93). That is a key chapter of the legislative history of the Excise Tax Reduction Act of 1965.

Defendants' exposition, however, is designed to bolster testimony of AT&T's Weber and Kemp that, during the years 1964-1970, they believed the excise tax was about to expire. Both defendants and the District Court attribute to these two witnesses a rather selective information base; routine statements in, what for laymen must be, obscure legislative reports are used to confirm their belief, yet the specific statements of AT&T's lobbyists are portrayed as irrelevant (148a-150a; Def. Br. 15-17, 22). Common sense would suggest that these witnesses learned more from other employees of AT&T and its house newspaper (e.g., E1122) than they did from combing legislative reports.

Moreover, the language of the legislative reports is of little moment. Despite words in these reports that may suggest that the excise tax was but a temporary measure, the simple fact is that each of the excise tax statutes passed during the relevant period extended the excise tax for a multiple of years -- up to four years

9. Deposition testimony of AT&T's lobbyists and correspondence between its officers and federal officials are described at 1528a-1534a.

-- not simply for one-year periods as had been the case in the early 1960's. Even when the tax was extended for 10 years -- which defendants now claim triggered their decision to separate -- the legislative reports contained the very same language which is purported by defendants to have weighed against separation at an earlier time (S. Rep. No. 91-1444, 91st Cong., 2nd Sess. (1970), reprinted in [1970] U.S. Code Cong. & Ad. News 5689, 5706).

"E. Consideration of * * * Separate Centrex Station Charges" (Def. Br. 17-20)

Defendants' presentation of how they considered and rejected unbundling of Centrex rates from 1965 to 1971 underscores a prime fact, which all their euphemisms cannot obscure: it was AT&T's employees who considered and decided whether Centrex customers would ever obtain the tax relief provided by the Reduction Act. Their brief uses such phrases as "companies consulted with AT&T before answering [customer inquiries] that no separation would be made" and relies on the District Court's statement that "no commitment was actually sought by AT&T or given by any defendant operating company" (Def. Br. 19). But the conceded fact pattern when clarified by the contemporaneous documents confirms a sequence which goes beyond "consulting": customer complaint, automatic referral to AT&T, a bit of rather cynical dodging at the AT&T level and then flat rejection in such words (circulated only internally) as: "[T]ariff people aren't about to change" (El290; Pl. Br. 24-26).

Defendants' brief also tells us that in the fall of 1965 AT&T called "two meetings of personnel from the defendant operating companies" (Def. Br. 17-18). The aim was to talk about what response they would make to the Reduction Act. The defendants characterized those who came as "implementers" (1570a) and that is the characterization accepted by the District Court (162a; Def. Br. 18). Of course, these were meetings of "implementers" -- because policy had already been decided by AT&T. The "implementers" were sent to get the word. These "implementers" were from every one of the operating companies, from all affected departments, including rate, accounting, commercial, treasury and legal (885a; E991-E1112). They inquired and duly received and recorded AT&T's position against the separation of Centrex rates (143a; 1358a-1359a). Despite the fact that the operating company personnel at the meeting said that a change in the tariff would make their "job of selling easier," the AT&T rate people stuck by their "adamant" decision (885a-892a, 899a-900a, 932a-934a, 1358a-1359a).¹⁰ That was the message the "implementers" carried back, and so no change was made in Centrex rate structure.

Finally, we noted in our main brief that even after the Reduction Act was passed in 1965, five defendant operating

10. Yes, it is a fact that six years later the person in charge of those meetings wrote of those meetings (E1408) that the AT&T rate people announced that they were "adamant" against establishing separate charges (Def. Br. 18 n."*"). Yes, he testified he "wrote it off the top of [his] head" and that his purpose in writing it was to assure his boss that his "rear" was covered (903a, 909a; Def. Br. 18 n."*"). We submit, in the whole context of AT&T and the Bell System, that memorandum and admission are but clear reflections of the real corporate life within the Bell System.

companies filed initial Centrex tariffs in some states, and all of these companies followed the AT&T line (Pl. Br. 22). Defendants say, as did the District Court, that this was entirely logical because the rate structure "was proving successful in other jurisdictions * * *." (Def. Br. 19-20). Almost any rate approved for these monopolies would be "successful." The point is that a different "structure" in the new filings would have repercussions that could cause changes all over -- endangering this "success" (read: high earnings pattern) of Centrex elsewhere. These new filings occurred when it was clear that the road to selling the Centrex systems would be easier for operating companies if they filed unbundled rate structures and charged a cheaper rate (e.g., 899a-900a).¹¹

"F." and "G. The Reasons Why AT&T did Not Recommend the Establishment of Separate Centrex Station Charges" (Def. Br. 20-28)

The largest portion of the Bell Statement is devoted to the question of why two employees of AT&T (Kemp and Weber) opposed unbundling the Centrex rate prior to 1971 and what motivated them.¹²

11. Defendants note that certain telephone companies unaffiliated with the Bell System also provided a package rate for Centrex-type service and say that we have never suggested that those companies were part of any conspiracy (Def. Br. 20 n.). Although plaintiffs have not charged these other companies with being part of a conspiracy, neither have we conceded that these companies were not part of a conspiracy. The question was never pursued during discovery, because it was outside the scope of the complaint.

12. Defendants open their discussion by giving five reasons which purportedly explain why Kemp and Weber were against separation (Def. Br. 20-22). We have already discussed at length why only one of

(footnote continued)

While much debated, this subject bears on only one legal issue before the Court: whether, under a rule-of-reason analysis, the actions of defendants were in restraint of trade.

Defendants' talk about reasons for not unbundling implicitly concedes two facts urged by plaintiffs. First, by identifying Kemp and Weber as the key decision-makers -- in defendants' phrase¹³ (but not ours) the "heart and soul" of any conspiracy (1486a) --

(footnote continued)

these reasons -- a concern about regulatory review -- was decisive, and have already shown why the other reasons put forward are insubstantial and/or contradicted by the contemporaneous documents (Pl. Br. 67-75). In brief: 1. Defendants claim that the separation of Centrex rates would have been time-consuming and costly; suffice it to say that when competitive pressures prompted defendants finally to separate, neither time nor expense (in 1971 dollars, not 1965 dollars) proved decisive. Similarly, the problem of pricing Centrex-CO was quickly solved. 2. Defendants state that the "packaging rate" structure was a good one, and AT&T was reluctant to change it; however, the separation proposal circulated by Weber in 1964, by its own terms, "would not appear to compromise our packaging objectives" (E941). Additionally, when Centrex rates were separated, the service continued to be a unified one, and customers were not permitted to elect only exchange access or inter-communication (E1387) -- preserving the "simplicity" stressed by defendants (Def. Br.7). 3. Defendants claim that Kemp and Weber were concerned about the IRS response; however, defendants moved to separate in 1971 without any discussion with IRS (1296a-1297a; E1406-E1407). 4. Defendants claim that Kemp and Weber, unlike most of their AT&T colleagues, believed the excise tax would end at an early date; although the District Court found their belief "not wholly unreasonable" (149a), we submit that this belief provides no defense to plaintiffs' claims and is highly suspect (see 12, above).

13. In an effort to raise the credibility of Kemp and Weber to monumental importance -- so that the District Court's finding on their credibility would supposedly preclude all issues -- the Bell

(footnote continued)

defendants admit that the critical determination of whether to separate Centrex rates was made by AT&T. They make no reference at all to any reason actually considered independently by even one of the defendant operating companies. Second, the Bell System's Statement confirms that it was defendants themselves -- and not any regulatory authority -- who assumed the power to determine whether the Reduction Act's tax exemption would be extended to Centrex customers.

Defendants properly say that we have claimed that they acted out of self-interest (Def. Br. 22). The record supports no other conclusion. There is no contemporaneously generated evidence that defendants were concerned with what was best for their Centrex customers; the evidence suggests just the opposite (e.g., E1282). While defendants now suggest (Def. Br. 21) that a separation of Centrex rates would have, through administrative

(footnote continued)

System brief erroneously attributes to us the "heart and soul" characterization which has always been theirs (1486a; Def. Br. 32, 37 n.; Pl. Br. 70). Before the lower court, Kemp and Weber were constantly portrayed as not the decision-makers but as "staff people," to shunt the trial court away from the impact of their decision for the Bell System; it was stressed that they reported to a host of others at AT&T and could not dictate or even heavily influence the operating company executives (546-547a, 553a, 1568a). Our point is that Kemp and Weber were the "word" carriers within the Bell System whose "recommendations" on Centrex were translated into policy decisions which became the law. The policy decision-makers at AT&T never testified at trial; and neither did the people familiar with how the "word" was implemented at the operating companies.

costs, raised the rate for Centrex service, they have not shown -- and cannot show -- that any such rate increases (if ever obtained) would have outweighed the substantial tax savings Centrex customers would have realized from a timely separation of Centrex charges. Moreover, the administrative expenses referred to by defendants were overhead items, not specifically allocable to Centrex, and thus any resulting rate increase would have been spread across the entire customer population and would surely have been negligible. These overhead items, in any event, are endemic to the telephone business (424a, 1292a-1295a), and it strains credulity to suggest that major decisions turn on them or properly ought to.

The District Court's finding that "defendants' failure to file separate rates for exchange access and intercommunication after 1965 was [not] motivated by a desire to shield Centrex rates from regulatory scrutiny" (156a) is clearly erroneous. Not only is it clearly erroneous, but it is contradicted by the trial court's specific finding (quoted in full in our main brief at 69-70) that "rate-making personnel in the operating companies and AT&T recognized the possibility that either subscribers or commissions might take the opportunity to attack the Centrex rate structure in general" and that "the outcome was uncertain" (147a-148a). We have

14. Ironically, it is on this issue -- and this alone -- that the District Court said that we rely largely on fragments of testimony not in context (151a).

shown at length that the record demonstrates that the reluctance to unbundle proceeded from a primary concern that Centrex rates might have been found to be excessive or discriminatory; we have quoted the admissions of Kemp and Weber and cited to the documents (Pl. Br. 67-76). We recounted the testimony of the chairman of the 1965 tax conferences who talked about a "can of worms":

"As I recall, the rate representatives said * * * that the tariffs would not be revised at this time. They had just gotten them through all of the various rate commissions with great difficulty and they would stand a great chance of losing the whole thing if they opened up that can of worms" (892a).

Defendants now say there is no inconsistency in the trial court's finding. This is so because (they speculate) "uncertainty of the outcome" might mean that Centrex rates could have been found to be "too low" or "the Centrex rate structure might be altered in an inappropriate manner" (Def. Br. 28). But it was the Bell System's stated objective to increase Centrex rates over PBX rates (El21-El22, El38, El44). As to the matter of "altering": it may well be that this was a fear; but the most to fear by a telephone company is that rates will be "altered" downwards.

15. Defendants point to the ultimate determination of a challenge to Centrex rates -- brought by the United States General Services Administration in New York -- as proof that Weber could not have been concerned that Centrex rates were too high (Def. Br. 25). But the argument has a major fallacy: the decision in the case came a year after the decision of Weber not to unbundle (483a-484a). The outcome of the case was very much in doubt when Weber was making his decision.

Even if Kemp or Weber had been concerned that Centrex rates were "too low," this would still reflect a selfish concern for overall Bell System earnings. Regulatory commissions compare the rates for

(footnote continued)

The point is that unbundling was done for selfish reasons and was delayed for selfish reasons, the most substantial of which was the desire to stabilize the price charged for Centrex. To deny that is to repudiate what the witnesses said and to ignore the more specific finding of concern about stabilization made by the trial court.

"H. The Filing of Revised Tariffs"
(Def. Br. 28-30)

The history of the separation procedure for Centrex rates conforms, of course, to the whole history of the package rate -- defendant operating companies acted only with leave of AT&T. Defendants' brief on the subject (Def. Br. 28-30) follows the usual pattern of euphemisms and fails to respond directly to the evidence of concerted action marshalled in our main brief (Pl. Br. 53).

We have already reported on the testimony of Mr. Ichter, relied on so heavily in this concluding episode of their Statement. (Def. Br. 29-30; see 3-4, above). Thus we note only that, whatever the Bell System would like to say motivated the unbundling, the extensive record before the Court supports only one reason why defendants separated Centrex charges in 1971 -- the emergence of competition, after years of monopoly, because of a decision in 1968

(footnote continued)

similar services, such as PBX, Centrex, and individual business lines (1218a-1220a). Had Centrex rates been found too low in comparison to these other services and had defendants been forced to raise Centrex rates, that would have interfered with the stated Bell System goal of making Centrex its "standard service" for major business customers (E103).

that said the Bell System had to allow other companies to connect equipment into its network (Pl. Br. 26-29). The various operating companies which sought in the early part of 1971 to obtain AT&T's "clearance" to separate, did so because of the competitive disadvantage of the tax; none made mention of the further extension of the tax for Centrex (E1193-1195, E1337-E1338, E1340, E1348-E1349). It was competition, intensified (perhaps) by the IRS ruling cited by defendants (Def. Br. 29), that finally turned AT&T around. Then, defendants separated to meet competition by reducing the prices they billed their customers; they could have done it and should have done it when their monopoly was absolute. That is why they have been sued. That is why they should be held liable.

Argument

Point 1

THE EVIDENCE, ALMOST ALL OF IT DOCUMENTARY,
ESTABLISHED AN AGREEMENT, COMBINATION AND
CONSPIRACY AMONG DEFENDANTS.

In our main brief, we argued that this Court could and should reverse the District Court on the issue of agreement, combination or conspiracy, without regard to the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure, for two reasons. First, in this essentially documentary case, this Court is free to deal de novo with the quasi-legal question of agreement, combination or conspiracy (Pl. Br. 37-43). Second, the District

Court stated, but then ignored, a series of basic rules of antitrust conspiracy, application of any one of which would require a finding of agreement, combination or conspiracy (Pl. Br. 43-54). We further argued that, in any event, the judgment below should be reversed and a judgment of liability entered because the trial court was "clearly erroneous" in finding no agreement, combination or conspiracy among the Bell System defendants (Pl. Br. 37, 54).

Defendants take issue with us by asserting most vehemently that the District Court correctly applied the rules of civil antitrust conspiracy. We reply to this first and illustrate the trial court's errors in applying the governing standards. We then turn to the matter of the real standard of review. Finally we stand up to the "clearly erroneous" test.

The Clear Legal Errors

We listed in our main brief a series of legal propositions that are elementary in antitrust cases, most of which the District Court also recited (121a-125a). We said that had the District Court properly applied any one of those propositions, and certainly all of them, it could not have concluded there was no agreement, combination or conspiracy among the Bell System defendants to structure Centrex rates and maintain them (Pl. Br. 46).

Defendants call this statement "simply astonishing", and claim that the District Court applied governing principles "conscientiously and painstakingly" (Def. Br. 34); they then list a

supposed three (omitting among others: "the modest evidence" rule; "no formal agreement" rule; and "extended period" rule) (Def. Br. 34-35). In satisfaction even of their own sparse list of principles, defendants but repeat some of the generalized findings of the District Court; they fail to refute -- or even discuss -- any of the significant details collected in our main brief (compare Pl. Br. 46 & n.14, 47-48, 50-54 with Def. Br. 34-37).

The District Court erred in a multiple of legal ways. Its opinion has two separate parts, which seem to have been written by two different hands. For example, the District Court stated the proper rule early on: "a finding of actual explicit agreement is not necessary *** a 'silent combination or understanding' may be sufficient" (122a). But later, the District Court required us to establish an explicit agreement -- openly discussed and arrived at -- to engage in illicit activity. The trial court found: "No commitment not to establish separate charges was ever sought by AT&T or given by any operating company" (162a).

The point is as we said it was and as we now show: apply any one of the conspiracy law rules for a civil antitrust case and plaintiffs win. We give an illustration.

The rule of law is that if there is consciously parallel behavior adhered to over a prolonged period of time, only a modest amount of additional evidence is required to establish a conspiracy;

indeed, complex uniform action maintained over a period of time makes irresistible the inference of concerted action. See United States v. United States Gypsum Co., 333 U.S. 364, 372-86 (1948); American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Masonite Corp., 316 U.S. 265, 275 (1942); Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., 513 F.2d 102, 110 (2d Cir. 1975); Overseas Motors, Inc. v. Import Motors, Ltd., 375 F. Supp. 499, 534-35 (E.D. Mich. 1974), aff'd, 519 F.2d 119 (6th Cir.), cert. denied, 423 U.S. 987 (1975).

Here prolonged parallel action is surely present. During the ten-year period between 1961 and 1971, all of the defendant operating companies put into operation and maintained the uniform unbundled Centrex rate structure, at AT&T's urging. Similarly, after AT&T's rate department shifted position in 1971, all of the defendant operating companies altered their Centrex rate structure, creating separate components for exchange access and intercommunication. These were "complex" matters involving intricate schedules, requiring detailed explanations at meetings and the like.

The "additional" evidence -- far more than "modest" -- before the lower court which compelled a finding of conspiracy was of two kinds. First, during the years 1965-1971, events occurred which -- but for an agreement -- would have prompted some different actions by operating companies. These included the following.

1. In 1965, the Reduction Act passed, making possible the exemption for "private com-

munication service" as soon as Centrex rates were modified to establish a "separate charge" (118a-119a).

2. Between 1965 and 1970, Congress passed four statutes deferring the phase-out and reductions of the federal excise tax provided by the Reduction Act. Tax Adjustment Act of 1966, 80 Stat. 38 (restoring the tax rate from 3% to 10%); Revenue and Expenditure Control Act of 1968, 82 Stat. 251-270 (continuing the tax for four and one-half years, at a rate of 10% through 1969); Tax Reform Act of 1969, 83 Stat. 487 (continuing the tax for four and one-half years, and maintaining it at 10% through 1970); and Excise, Estate and Gift Tax Adjustment Act of 1970, 84 Stat. 1835 (continuing the tax for ten years, at a rate of 10% through 1972) (see 149a & n.62).

3. Between 1965 and 1970, several of the defendant operating companies (including New York Telephone, Southwestern Bell, and Ohio Bell), received inquiries from customers requesting a change in the Centrex rate structure (143a & n.58; E1254-E1294).

4. Between 1965 and 1970, five operating companies filed initial Centrex tariffs. By that point, the Reduction Act had been passed, so that a separate charge for intercommunication would have resulted in lower excise taxes for their initial Centrex customers -- at no cost to the operating companies (143a, 164a & n.76).

Second, there were repeated communications, some with the language of agreement and some in the language of ukase, as well as continuing relationships which provided both the opportunity and the atmosphere for concerted action. These included the following:

1. By agreement and by established practice, the defendant operating companies relied upon AT&T -- it was their "centralized staff resource" (158a, 1328a; Pl. Br. 9-12)

2. In 1961, AT&T communicated to the defendant operating companies the "basic principles and procedures which it would seem feasible for all Companies to follow in establishing rate treatment for Centrex Service" (135a). AT&T expressed the goal of fostering "Systemwide uniformity of rate approach within all practical limits" (137a). This theme was strongly stated in a letter sent to all operating companies on April 28, 1961, which told them to recall "the general acceptance reflected there [at a February 1961 conference]" and to "anticipate the consistent approach among the Companies which we all agreed was so vital in a basic service offering of this sort." The letter stated: "It would be hard to overemphasize how important it is that all departments having anything to do with Centrex Service understand and act in conformity with the fundamental principles on which the rate treatment is based" (E209).

3. Between 1965 and 1971, AT&T repeatedly communicated to the defendant operating companies the unequivocal position of Kemp and Weber -- that no separation should be made (142a-143a). There were (i) the complaints of customers about the tax, referred to AT&T, and given a "song and dance" and then sent back to the operating companies with a directive that nothing be done about them (143a; E1254-E1294; Pl. Br. 24-26); (ii) the conferences attended by all when AT&T's "adamant" position was stated (142a; Pl. Br. 22-23); (iii) memoranda sent to all (E979-E1112); and (iv) communications with particular companies (143a; see E1254-E1294).

We submit that it is inconceivable to apply the "modest additional evidence" rule and come up with a verdict of "no agreement, combination or conspiracy".

We look at another rule. Where consciously parallel behavior, plus something more, suggests an agreement, only proof of independent action can refute that suggestion. See Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 201 F.2d

306, 309-310 (4th Cir. 1953), aff'd, 346 U.S. 537 (1954); Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036 (2d Cir.), cert. denied, 429 U.S. 885 (1976); Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., 513 F.2d 102, 111 (2d Cir. 1975).

There is no proof at all that prior to 1971 any defendant operating company independently considered whether to separate Centrex rates; we so stated in our main brief (Pl. Br. 50), and defendants have not refuted us. In the absence of evidence showing independent judgment on the main question, the lower court relied on evidence supposedly reflecting independent judgment on related issues (163a-164a).¹⁶ We showed at length in our main brief that none of these examples negate a finding of conspiracy on the main event: a package rate (Pl. Br. 49-54). Defendants invest not a single word on refuting or discussing our presentation; rather, they simply conclude that our discussion was "highly selective and one-sided" (Def. Br. 37) and they dote on trivia and on variations that local regulation and

16. The District Court recognized at one point in its opinion that in evaluating the purposes which motivate a corporation the focus must be on what each individual decision-maker "knew and considered in exercising his judgment upon which such corporate action was taken * * *"; a court should not look to "what other persons in other departments or other corporations who were without authority or responsibility for those decisions might have known" (135a). Unfortunately, here again the District Court ignored its own prescription.

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history forced on them, while skipping the obvious main pattern.

This lingering over minor and permitted variations reminds us of still another rule, which the lower court did not apply in our case, but subsequently did in another case. Judge Weinfeld recently wrote:

"The requisite 'unity of purpose' or 'common design' to establish an antitrust violation does not necessarily require conspirators to adopt identical conduct. Such a reading of the statute would immunize from prosecution particularly clever conspirators." Hunt v. Mobil Oil Corp., 75 Civ. 1160 (S.D.N.Y. Jan. 11, 1978) at p. 5.

We could go on this way with all the principles (Pl. Br. 43-45). The sum of it is that the errors of the District Court in finding no agreement here are legal errors -- that require no use of a "clearly erroneous" test. If upheld, the trial court's application of the basic principles of antitrust conspiracy would provide a major unwarranted obstacle in this Circuit to proper enforcement of the antitrust laws.

17. Defendants suggest that we would require them to produce a witness from each company to show independent consideration prior to 1971 of the question whether to separate (Def. Br. 37 n.). We proposed no such requirement. We only underscored the gaping hole in defendants' case, that not even one such witness was produced. Defendants further state that the testimony of Kemp and Weber -- which we have already discussed -- "together with the other evidence in the case, negated the existence of any conspiracy" (*id.*). Defendants give not a single citation for that "other evidence."

No "Clearly Erroneous" Rule in All Events

We showed in our main brief that the "clearly erroneous" standard of Rule 52(a) is inapplicable to the ultimate question whether defendants conspired, particularly since this was a paper case (Pl. Br. 37-43). We relied primarily on United States v. General Motors Corp., 384 U.S. 127, 141 (1966) and United States v. United States Gypsum Co., 333 U.S. 364 (1948).

The facts requiring the finding of a conspiracy are all of record (see 3-10, 13-20, 24-26 above). The key details, as we have shown (see 4-6, 13, 16-17, 24-26 above) are not in dispute; most were found by the District Court and are supported by the documentary records. As in General Motors, we ask the Court to look to the lower court's own findings, amplified by the record, to find a "conspiracy". And, of course, the rote denials of conspiracy by defendants' witnesses -- in conflict with the record as a whole -- are to be discounted; testimony on ultimate issues is of little import. Indeed, defendants' own counsel made this point during a deposition, which was read into the record (902a).

Defendants dispute that this is a "paper" case, "distinguish" our cases (Def. Br. 33 n.) and cite certain cases for the proposition that de novo review is proper only if a case is entirely "on paper" (Def. Br. 32-33). They are wrong. For example, in General Motors, there were some live witnesses, although the record was largely documents and depositions. Here, there were 1,755 pages

of trial exhibits (E1-E1755). Of the 1,652 page appendix, only 311 consist of live trial testimony (1166a-1477a); 111 pages (412a-523a) are taken up by stipulations, and 546 by the presentation of our paper case (585a-1125a, 1478a-1484a). Notably, less than 10 of defendants' own 73 paragraphs of proposed findings rely solely on live testimony (1553a-1585a); the bulk of citations are to stipulated facts, depositions and documents. Moreover, as in the Gypsum case, whenever the Bell System would say no agreement and look to the conclusory testimony of a witness, a document or other detailed listing disproves the claim.

The "Clearly Erroneous" Rule Applied: Reversal is Still Compelled

We have in our main brief (Pl. Br. 9-18, 20-31, 46-54) and in this brief (see 1-21, 24-26 above) marshalled the relevant evidence on how the Centrex rates were created, maintained and unbundled in the context of the Bell System, giving all the details that space would allow. We also anticipated and replied at length to the claim of independence (Pl. Br. 49-54) now briefly made in Point I of the Bell System brief (Def. Br. 36-37).

The "definite and firm conviction", which the "entire evidence" and "common sense" leave, is that the Centrex rate structure was created, maintained and then unbundled in the concert of action which is "combination" or "agreement" or "conspiracy". The package rate came to be, continued and then changed on the bedrock of an agreement to agree. Not only is the overall pattern clear, but there are fatal contemporaneous admissions; even the corporate

jargon equates in final analysis to agreement (e.g., E1408; see 4-6, 13-14, above). To say that there is no combination or agreement is to deny reality; the Bell System exists in combination and thrives on it.

We submit that the trial court's error in not finding an agreement, combination or conspiracy probably stems from the fact that it found nothing wrong in what defendants joined to do. The District Court's opinion treats "conspiracy" itself as nefarious matter. But the question of agreement, combination or conspiracy is -- as the lower court noted early in its opinion (121a) -- a separate issue from whether its aim is legal, per se illegal or illegal because unreasonable.

Short of some renegade from the Bell hierarchy sitting in court and saying we "agreed", we "combined" and we "conspired", there would never be a more overpowering case before this Court based on a combination of (i) undisputed evidence of parallel conduct, (ii) opportunity and motive for agreement, (iii) constant communications among the defendants on the very subjects of the agreement, and (iv) documents and testimony using the words "agreed", "clearance", "committed" and the like. As we have noted, in contrast to the overwhelming proof of agreement, combination, contract or conspiracy here, defendants have produced not a stitch of evidence of independent consideration or review by the operating companies of the question whether to separate or not (Pl. Br. 50; see 17, above). As to the witnesses they did produce, the issue is not only whether they were believable, but what parts of their

testimony are believable as opposed to others, and what parts of their testimony bear on essential issues; those are questions the District Court did not address.

Accordingly, even under the test of "clearly erroneous" this case must be reversed on the issue of concerted activity.

Conclusion

On any standard of review, the District Court's finding of no agreement, combination or conspiracy cannot be sustained. Since, as we have shown and are about to argue again, the aim of this concerted activity was illegal, the case must be reversed.

Point 2

DEFENDANTS' AGREEMENT, COMBINATION OR CONSPIRACY TO PRESERVE THE STRUCTURE OF THEIR CENTREX RATES VIOLATED SECTION 1 OF THE SHERMAN ACT: (i) IT WAS A PER SE VIOLATION BECAUSE IT WAS CONCERTED ACTION TO FIX PRICES; (ii) AT THE VERY LEAST, IT WAS AN UNREASONABLE RESTRAINT OF TRADE.

In our main brief we demonstrated that the Bell System's structuring -- here stabilizing, at minimum -- was a per se violation of Section 1 of the Sherman Act; that is, forbidden price fixing that cannot be justified by good motives or noble purposes (Pl. Br. 55-64). In the alternative, we showed that this price structuring was an unreasonable restraint of trade (Pl. Br. 64-66). Defendants now say that the per se rule

has no application (Def. Br. 39-44) and that there was no violation of the rule of reason (Def. Br. 44-49). We run down all of the defendants' contentions and show them to be wrong.

A Per Se Violation

(i) The "horizontal" question

Defendants' primary point is that there cannot be a violation of Section 1 of the Sherman Act by entities in "horizontal" market positions, if they are not direct competitors. They cite a series of cases for the proposition, none of them emanating from the Supreme Court of the United States or from this Court (Def. Br. 39-40). There are three major answers to this contention.

First, the Supreme Court has set no such arbitrary limits on who can unlawfully conspire with whom. There is no "immunity" for price fixers who are not head-to-head competitors. The Supreme Court rule is against price fixing in broad form; defendants would reach in vain for dictum in support of their position. See, e.g., Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (agreement between parent and subsidiary to fix whiskey prices); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222-23 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

The test under the statute is "restraint of trade;" that is the language used. The focus is on the nature of what

is being done and not by whom: are prices being manipulated; is there an anti-free market effect? Thus it is that defendants, who are not in competition, but are, with AT&T, in some "vertical" relationship, can be guilty of price fixing. See, e.g., Continental T. V., Inc. v. GTE Sylvania Inc., 97 S. Ct. 2549, 2558 n.18 (1977); Albrecht v. Herald Co., 390 U.S. 145 (1968); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). The District Court, indeed, recognized that you do not have to be a competitor to conspire to violate the antitrust laws (134a), citing Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142 (1968); Albrecht v. Herald Co., supra, 390 U.S. at 150 n.6 (1968); Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 511-12 (3d Cir. 1976)).¹⁸

Price fixing is an evil because of its effect on the market place; it cheats the public. That is what Justice Stone told us in Apex Hosiery Co. v. Leader, 310 U.S. 469, 500 (1940) in the quotation given to us by defendants (Def. Br. 38). Of course, concerted action to fix prices can be arranged by competitors or vertical suppliers. But it also can involve collateral "beneficiaries" -- say, union officials, all-too-friendly bankers, retail credit associations, etc.

18. Here again the District Court's opinion divides in two; far later in the opinion, the fact that defendants are not directly in traditional competition supposedly "militates against" their being engaged in price fixing (compare 134a and 150a with 168a and 175a.)

In United Mine Workers v. Pennington, 381 U.S.

657, 663 (1965), the Supreme Court has already given a hypothetical case that destroys the Bell System's notion of confinement of price-fixing antitrust violations to traditional horizontal competitors or traditional vertical supplier-buyer situations. Looking at the union ("the UMW") and the possibility that it could conspire with mine operators to fix prices, the Court said:

"If the UMW in this case, in order to protect its wage scale by maintaining employer income, had presented a set of prices at which the mine operators would be required to sell their coal, the union and the employers who happened to agree could not successfully defend this contract provision if it were challenged under the antitrust laws by the United States or by some party injured by the arrangement." 381 U.S. at 663.

In our case there was surely an attempt to affect the "marketplace" to avoid the pressure that would find multi-state users (such as some of the plaintiffs here) complaining that only some Bell System companies were giving the benefit of the tax break and thereby threatening the onset of regulatory review; defendants sought to guard the price structure from scrutiny and prevent the opening of a "can of worms" (see Pl. Br. 69-73; 19, above). That intrusion on the marketplace was unlawful, whether or not defendants compete in the usual context.

Second, even assuming (contrary to logic and Supreme Court reasoning) the dictum supposedly requiring head-to-head

competition in "horizontal" cases has a very broad reading, it would have no bearing on this case. Defendants omit the one factor stressed in the very cases cited by them (Def. Br. 39): "the rule" they find applies only when there is a free market, free of monopoly pricing; for then there is no deleterious effect on the price the consumer pays. See, e.g., Evans v. S. S. Kresge Co., 544 F.2d 1184, 1192-93 (3rd Cir. 1976), cert. denied, 430 U.S. 953 (1977); Call Carl, Inc. v. BP Oil Corp., 403 F. Supp. 568, 572-73 (D. Md. 1975), aff'd in part and rev'd in part on other grounds, 554 F.2d 623, 628 n.4 (4th Cir.), petition for cert. filed, 46 U.S.L.W. 3244 (Oct. 11, 1977).

The free market place is, logically, essential to the underlying rationale of those cases that proclaim the dictum of "no competitors, no illegality." In a market where multiple vendors are competing for the same customers, an agreement between one of these vendors and a non-competing entity would have little adverse impact (unless special circumstances of some kind existed) on price competition. Presumably, those vendors who do not enter the conspiracy would continue to charge competitive prices free of the impact of the conspiracy, and competition might even be promoted. However, where each defendant operating company has a monopoly position there is no similar safeguard. An agreement among several such monopolists, which serve different geographic areas, to fix their price structure would have an undiluted impact on each market served by the conspirators.

Thus, in the Call Carl case, independent service station operators brought suit against a gasoline marketer and its wholly-owned subsidiary, claiming that a plan implemented by the marketer and its subsidiary in the Baltimore/Washington market, among other things, resulted in price fixing. In determining whether to apply the doctrine of intra-corporate conspiracy to the defendants, the court concluded that no conspiracy to price fix could exist, because the parent and the subsidiary were not competitors in the market in which prices were being allegedly fixed. However, the court stressed the fact that the relevant market had other competitors, who were not alleged to be part of any conspiracy. The court stated:

"Common sense dictates the conclusion that where conspirators are not competitors in the market in which prices are allegedly being fixed, and there is horizontal competition in that market, then no harm can be done, and therefore no restraint of trade can be accomplished by, an agreement to refuse to deal or to fix prices." 403 F. Supp. at 572-73 (emphasis in original, footnote omitted).

The Kresge case, relied on so heavily by the Bell System, offers the same principle. There, defendant Kresge operated K-Mart Department Stores. In an effort to increase the number of shoppers in its stores, Kresge decided to enter into an arrangement with a supermarket company to operate supermarkets under the K-Mart name within or adjoining various K-Mart stores. The supermarket company and Kresge agreed, among other things,

to charge the same price for the small number of items sold both in the supermarket and in other sections of the K-Mart store. In a suit brought by the trustee in bankruptcy of the supermarket company, rather than by a consumer allegedly injured by this price agreement, the court held that the challenged restraint was actually pro-competitive since it enabled Kresge to broaden the scope of its discount operation:

"[F]ar from attempting to stifle competition, the restrains [sic] had as their purpose the stimulation of business and efficiency for both the department store and the supermarket: they (the restraints) would assure that the overall operation would compete effectively in both the discount and food markets vis-a-vis other department store and food discounters." 544 F.2d at 1193.

Thus, once again, the court emphasised the presence of non-conspiring competitors in the same market, whose presence and whose profit motivations assure proper price competition,¹⁹ irrespective of the challenged restraint.

Third, sound antitrust policy dictates no blanket rule to confine price fixing to classical competitors or to vertical supplier-seller situations. None of the cases cited by defendants deals with price fixing by regulated monopolists operating in different geographic markets; defendants have

19. In United States v. Columbia Pictures Corp., 189 F. Supp. 153, 178 (S.D.N.Y. 1960), the second reported decision in that action, the court, in evaluating whether or not an ancillary restraint is proper, also emphasized the absence of a monopoly in the relevant market.

not cited a single case which supports their position. We submit that the decided cases demand Section 1 application to the present set of facts. Customers are entitled to independent pricing decisions by the vendors who serve them; this is the essence of Section 1. Here, the defendant operating companies are sensitive to only a limited type of competitive pressure. They do not compete in order to win away customers from each other; they cannot do so, because they have exclusive geographical service areas. However, they do compete for customer loyalty and their prices affect each others.

Recognizing (the documents clearly show they did) that Centrex customers were served by various defendant operating companies, the defendants wanted to assure uniform price structure and "reasonable" similarity so that mutual customers of several operating companies would -- in the District Court's words -- "be less likely to complain" (141a; see E103). They sought to avoid this form of competitive effect. But this interaction, if left to take its course by defendants, would create a benefit for the public. It is a kind of "competition," and it leads to reasonable pricing. Combination to avoid or suppress that interaction means tampering with prices and depriving the consumer of the only vestige of marketplace freedom there is. That is against the law. Indeed, the Supreme Court tells us to safeguard any vestige of competition when we are in, or near, a monopoly situation. See United States v. El Paso Natural Gas Co., 376 U.S. 651, 659-60 (1964).

There is nothing "attenuated" or "speculative" about this "chain of causation" (Def. Br. 40-41). As the lower court found, defendants were concerned about multi-state customer pressures (141a). When the unbundling process began after 1971, the multistate users did put pressure on the Bell System to get on with the job once they obtained tax relief from one of the Bell companies (511a-514a; E1419-E1432).

(ii) Fixing price structure (not taxes)

Defendants contend that the agreement we allege concerns a federal tax as opposed to an agreement to "fix prices" (Def. Br. 42). Once again, defendants clutch at a label, in order to deny the reality of the situation.

Factually, we are dealing with an agreement about pricing structures. Defendants were concededly talking about price "structures" and "packaged" and "uniform" rates. They were dealing with "tariffs." The most direct and foreseeable effect was that the consumer paid a higher price -- a price inflated at least by the amount of the tax. But defendants' concern was not about more or less tax; it was about protecting their rates and fiddling with them.

(iii) Stabilizing price levels

We do not quite understand defendants' purpose in telling us that, in their view, fixing one component of a total

price does not violate Section 1 of the Sherman Act unless it has either the purpose or effect of fixing or stabilizing the total price (Def. Br. 43). There can be no question here that unbundling would have led to an immediate change in the price billed to the customers and paid by them. More key to the defendants, unbundling would have led to scrutiny by state rate commissions that could have tampered with price. Both these elements have the effect or purpose of price stabilization. Even defendants now admit in their brief that they feared that "Centrex rate structure might be altered in an inappropriate manner" (Def. Br. 28). They feared change would open "that can of worms" (892a). They wanted a reasonably similar price structure for all the operating companies and they protected it (El05; 1319a). That is price stabilization.

Defendants' view of the law is too narrow. They offer excerpts from the District Court's opinion in Jacobi v. Bache & Co., 377 F. Supp. 56 (S.D.N.Y. 1974), aff'd, 520 F.2d 1231 (2d Cir. 1975), cert. denied, 423 U.S. 1053 (1976). As the opinion of Judge Friendly in this Court reveals, neither the purpose nor the effect of actually fixing or stabilizing the commission rates was involved there. In fact, as the Court of Appeals held, the agreement did not deprive any defendant of the right or power to determine the price it was going to pay its registered representatives and salesmen; hence it was not unlawful.

20. Arizona v. Cook Paint & Varnish Co., 391 F. Supp. 962 (D. Ariz. 1975), aff'd, 541 F.2d 226 (9th Cir. 1976), cert. denied,

(footnote continued)

It is in this argument about an imagined agreement to fix taxes that defendants modestly refer to a major point that they won on in the District Court: they were not fixing uniform prices but dealing with rate structures (Def. Br. 41). We understand their decision to downgrade the point.

Defendants fixed prices to the extent that they were capable of fixing prices. Given regulatory commissions in all the states, historic costs and other matters with which they had to contend, actual tariff rates had to be different. But AT&T intruded in every way imaginable with its so-called "recommendations" to tell what rates should be -- including sending a model rate schedule with prices on it (E108).

The Supreme Court definition of price-fixing is as we said it was in our main brief (Pl. Br. 56-57): there is just no requirement that a conspiracy set specific prices or even set prices directly. United States v. Container Corp. of America, *supra*, 393 U.S. 333, 334-35 (1969); United States v. General Motors Corp., *supra*, 384 U.S. at 147-49; United States v. Socony-Vacuum Oil Co., *supra*, 310 U.S. at 222-24. The question is whether

(footnote continued)

430 U.S. 915 (1977), also cited by defendants, is even further off point. In that case, the issue was whether defendants' advertising of a product as flame resistant, when in fact the product was flammable, constituted price-fixing. The court found too fragile a nexus between the advertising claim and the ultimate market price, based as it is on varying consumer perceptions and on demand.

the activity involved had the purpose or "the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity ***." United States v. Socony-Vacuum Oil Co., supra, 310 U.S. at 223; see Pl. Br. 56-57 (and cases cited).

So it is that price fixing has been held to include more than direct manipulation of price and conduct far more removed from direct price tampering than the Bell Systems' actions here. See National Macaroni Mfrs. Ass'n. v. F.T.C., 345 F.2d 421 (7th Cir. 1965) (conspiracy among macaroni manufacturers to reduce the durum wheat content of macaroni thereby avoiding competition among themselves for this major component of macaroni held to be price fixing); United States v. General Motors Corp., supra, 384 U.S. at 147-49 (boycott of car retailers who undersold regular General Motors dealers held to constitute price fixing conspiracy as well as group boycott); United States v. Container Corp. of America, 393 U.S. 333 (1969) (tacit agreement to furnish one another with recent price information held to be price fixing); see also, Plymouth Dealers Ass'n v. United States, 279 F.2d 128 (9th Cir. 1960); United States v. United Liquors Corp., 149 F. Supp. 609 (W.D. Tenn. 1956), aff'd per curiam, 352 U.S. 991 (1957).

An Unreasonable
Restraint of Trade

We stated in our main brief that even if this Court decides that the per se rule should not be applied to this

price-fixing case, defendants' conduct must be found to violate the rule of reason. Applying the classic formulation of Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918), we reviewed the record at length and we showed that the purpose of the defendants' actions was in no way aimed at promoting competition but was rather selfishly directed at protecting their Centrex rate structure (Pl. Br. 67-75).

In answer here, defendants rely on the fact that the District Court found that the Bell System did not restrict any operating company's ability to offer Centrex at whatever price it desired (Def. Br. 45; 174a). That finding is unjustified; it is clearly erroneous. There is no question -- based on the evidence in this case -- that the freedom of the Bell companies to modify their Centrex tariffs as they wanted is a fiction.

The defendants also rely on the District Court's observation that defendant operating companies are regulated by state or local authorities (Def. Br. 45-46; 174a-175a). They add that "[s]ubstantial authority supports the principle that federal antitrust laws do not apply to conduct of a public utility * * *," (Def. Br. 46), a contention that the District Court did not accept (178a-179a n.95).

We have already noted (see 11, above) that no official body before 1971 ever passed on whether Centrex rates should or

should not be unbundled; a key purpose was to keep Centrex rate tariffs from close scrutiny by state and local regulatory bodies; if anything, the existence of the regulatory bodies here and the monopoly given defendants makes defendants' conduct more unreasonable. As licensed monopolies, the Bell System companies have a higher duty of responsibility to their customers, not less; conduct that might possibly be reasonable in a free market is not necessarily all right for monopolizers. See, e.g., United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 344 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954).

It is surely now well settled that a state regulatory commission does not immunize any defendant from the reach of the antitrust laws. See Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) and our briefs filed with the District Court that are in the record as Items 344 (pp. 138-145) and 349 (pp. 10-13). The Bell System has tried this argument before, and it has been rejected. See, e.g., Litton Systems, Inc. v. South Western Bell Telephone Co., 539 F.2d 418 (5th Cir. 1976); and Chastain v. American Telephone and Telegraph Co., 401 F. Supp. 151 (D.D.C. 1975)

Defendants also rely, as did the District Court, on the supposed fact that there was no restraint upon competition in the usual sense here (175a). We repeat: the Supreme Court jealously protects whatever vestige of competition there is in these monopoly situations.

Defendants now rely again on the District Court's finding of unselfish desires on their part and the supposed fact that defendants were not attempting to shield their rates but simply to try to prevent unnecessary expenditures (Def. Br. 47-48; 177a-178a). We have shown in our main brief -- and have talked about it again here -- that this argument and finding are not supported by the evidence and are gainsaid by other findings (Pl. Br. 68-75; see 15-21, above). In this area the District Court was again quite "clearly erroneous."

Conclusion

As defendants say in their conclusion: "Section 1 of the Sherman Act is concerned with the fixing or stabilizing of prices * * *" (Def. Br. 48), and "Section 1 of the Sherman Act is directed at agreements having an anticompetitive purpose and effect * * *" (Id.). But contrary to what they say in that conclusion and what the District Court found, we have both in this case and, thus, both a per se violation of Section 1 and an unreasonable restraint of trade. Accordingly, the District Court's judgment should be overturned and judgment of liability should be entered for plaintiffs on the antitrust claims.²¹

21. Defendants tell us that there are a number of issues not reached by the District Court and, therefore, judgment cannot be entered in our favor no matter what this Court decides. But

(footnote continued)

Point 3

THE EXCISE TAX REDUCTION ACT OF 1965
REQUIRED DEFENDANTS TO MAKE A SEPARATE
CHARGE FOR CENTREX SERVICE WITHIN A
REASONABLE TIME.

Defendants deny (Def. Br. 50) that the Reduction Act mandated that they unbundle their charges for intercommunication and exchange access -- as a matter of bookkeeping entries or otherwise -- "within a reasonable time" as we argued in our main brief (Pl. Br. 77-93). They say that "the structure" of the excise tax laws and state regulation, the language of the Reduction Act, its legislative history and other federal statutes show that there is no such mandate; and they say that there is no merit to any of our Constitutional arguments (Def. Br. 50). They avoid, however, saying that they had the discretion to determine whether Centrex rates would be separated and they seem to be arguing that it was all up to the state

(footnote continued)

that is not the rule for the Court of Appeals; we are, in this Court, entitled to a full presentation of defendants' claims of why this case should be decided their way. If defendants wanted to argue their miscellany of points, they should have done so. In fact, we understand their reluctance because none of their points are substantial. Our answers to all the points are in trial level memoranda that are in the record; for the benefit of the Court, we give the citations: (1) As to the effect of interstate commerce (Record Item 369, pp. 2-4); (2) as to the significance of the filing of Centrex rates (Record Item 344, pp. 138-145; Record Item 349, pp. 10-13; Record Item 369, pp. 10-12); (3) as to plaintiffs' injuries to their business or property (Record Item 349, pp. 37-39); (4) as to the question of venue with respect to 19 of the defendant operating companies (Record Item 344, pp. 173-183); (5) as to an alleged retrospective application of the antitrust laws (Record Item 349, pp. 3-4); (6) as to plaintiffs' standing to represent customers of all the operating companies (Record Item 72, pp. 13-45; Record Item 349, pp. 1-2; 231a); and (7) as to the statute of limitations and laches (Record Item 349, p. 3 n.).

regulatory bodies (Def. Br. 50-52).

Since we have anticipated a great deal of what they urge, we make only some brief reply points.

The State Regulation - Structure Argument (Def. Br. 50-52)

1. In no way have we said or suggested that the Reduction Act required regulatory authorities to inaugurate any particular form of tariff. The Reduction Act, we said, required defendants to unbundle -- at least for bookkeeping purposes -- their charges for intercommunication and exchange access. The universal system under which AT&T and its subsidiaries work with local authorities is for the operating companies to make proposals for changes -- not for the regulatory authorities, sua sponte, to make changes for them. Thus, Carrigan v. Sunland-Tujunga Telephone Co., 263 F.2d 568 (9th Cir.), cert. denied, 359 U.S. 975 (1959), cited here by defendants, deals with a problem that has nothing to do with this case: whether the excise tax laws mandated the adoption of a particular form of tariff charge by the regulatory authorities.

Plain Language (Def. Br. 53-54)

2. This statute is not plain; its words suggest obligation and at least an inquiry. Indeed, the very thought that the Government intended to give the Bell System defendants control over many millions of dollars of taxes surely invites "interpretation" and some hard questioning (see Pl. Br. 78-83).

Legislative History (Def. Br. 54-55)

3. Defendants, in fact, avoid a detailed look at legislative history. They will not tell you that it was the AT&T lobbyists, who not only banged the drums for the Reduction Act, but submitted the draft of the bill that became the Act (E874-E875). They do not tell the Court that the burden of the argument of the AT&T lobbyists was that they wanted to give relief to customers who used the private communications service (E932-E940). Nor do we hear from defendants that the Joint Congressional Committee's chief drafter was concerned lest the federal tax base be controlled by state regulatory actions and that, a fortiori, it could not be that the Congressional drafters of the Reduction Act wanted to give control to the private telephone companies (Pl. Br. 82-83; 716a; E893-E909).

4. Of course, the anticipation of the drafters of the Reduction Act had to be that AT&T would fulfill its desire to give relief to its customers; that had to be the expectation. In light of that expectation, it is highly significant that the Congressional reports do not speak of there being a tax "unless" a separation is made; but speak of the tax operating "[u]ntil such a separation is made ***" H. R. Rep. No. 433, 89th Cong., 1st Sess. 31 (1965), reprinted in [1965] U.S. Code Cong. & Ad. News 1645, 1677; S. Rep. No. 324, 89th Cong., 1st

Sess. (1965), reprinted in [1965] U.S. Code Cong. & Ad. News 1690, 1726. If that language means anything, it surely means that, at a minimum, Congress expected the separation to be made before 1969, when the tax was to expire by the terms of the Reduction Act.

Other Legislation (Def. Br. 57-59)

5. It is just not true that whenever Congress intends to do something in a tax statute it does so clearly and unambiguously. We submit that there is a library full of cases to negate that proposition. Thus, it is simply not a fact that had Congress intended to require the Bell System to do what it gave promise to do, it would necessarily have said so quite plainly. We submit that this is particularly the case here, where it was AT&T that did the drafting -- as well as, apparently, the misleading.

6. Each one of the other statutes cited by defendants surely has its own Congressional history; but we wonder if any one of them had such an intimate association with the particular taxpayer-private tax collector as does this one. This was truly like a "private bill" and has to be construed against the Bell System. See Blair v. Chicago, 201 U.S. 400, 463, 467, 469 (1906).

The Rule to Avoid Constitutional Problems (Def. Br. 59-63)

7. Defendants misstate our "Constitutional" argument: we do not say that the Reduction Act is unconstitutional. We

say that the Reduction Act would present a very "troublesome" Constitutional problem if it were interpreted as defendants would have it interpreted: that is, they had unchecked control of when and if their customers would be taxed (compare Pl. Br. 84-90 with Def. Br. 59-60).

8. We are also not saying that the state and local regulatory authorities were to be the decision-makers, a situation against which the drafters of the Reduction Act were adamant (716a; Pl. Br. 83). It was the defendants who, at their own behest, were given the power to file tariffs or unbundle Centrex rates as a bookkeeping method and thereby to tax or not to tax; we say that they had a corresponding duty (Def. Br. 60).

9. And we are not saying that the taxability of a transaction cannot depend "upon the manner in which the transaction is structured" (Def. Br. 60). Our point is that a delegation of taxing power by the Government to the whim of private parties, who are not the taxpayers, presents a most serious Constitutional issue. Thus, in fact, Phillips v. Commissioner, 283 U.S. 589 (1931), Helvering v. Lerner Stores Corp., 314 U.S. 463 (1941) and Rochester Gas & Electric Corp. v. McGowan, 115 F.2d 953, 955 (2d Cir. 1940) have no application here.

10. If the Bell System is correct, the defendants were at once (i) tax collectors, (ii) legislative consultants,

(iii) authorized monopolists and (iv) finally, also the dictators of when and if taxes were to be collected from their customers. Under those circumstances the rule in Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944), a case which defendants ignore, applies: such power cannot be unrestrained and a duty of reasonable conduct is to be interpolated.

Conclusion

The defendant-monopolists had a duty to act reasonably and swiftly -- as they led Congress to expect. The Reduction Act requires them to unbundle their Centrex rates and give their customers the promised tax relief. They violated a fiduciary duty created by a statute that they drafted and shepherded through the Congress.

Point 4

PLAINTIFFS MAY SUE DEFENDANTS
FOR RETURN OF EXCISE TAXES
WRONGFULLY OVERCOLLECTED.

We anticipated every argument made by defendants against our right to sue them for an overcollection (Pl. Br. 94-100; Def. Br. 63-70) and some of what the Government now says (Gov. Br. 13-21). Only several comments on the two briefs appear in order:

1. We are not in error about "gearing words"; the Government is (Gov. Br. 11). Plaintiffs are suing defendants

in an "arising under" case under Section 6415(c) of the 1954 Code. Section 6415(c) has no language limiting its application to situations where defendants in turn have a right to take a credit from the Government on a subsequent return. Section 6415(c) is not connected to Section 6415(b), which gives defendants the right to take that credit. Thus, Section 6415(c) is also not dependent on -- not "geared" -- to the Treasury Regulation that limits Section 6415(b)'s credit rights to "clerical or mechanical errors." Treas. Reg. 42, § 130.77 (1942)(209a n.32).

But, as Judge Weinfeld noted, both the right of the taxpayer to make a claim for a refund from the private collector and the private collector's right to take a credit on his next return were once in one section of the old Internal Revenue Code and were dependent on one another (Internal Revenue Code of 1939, § 1715(d)(2) (208a n.31)). In turn, that old section was modified by the Treasury Regulation that limited the right to "clerical and mechanical errors." Treas. Reg. 42, Art. 51 (1932).

The "gearing" was eliminated by the 1954 Code's separation of the collectors' right and the taxpayer's right in two different subsections; no words connect them. One clearly is not dependent on the other. Thus, the Government is in error when it says (Gov. Br. 11) that the gearing words were not eliminated in 1954.

22. The error is due apparently to a misreading of what the gearing words were (Gov. Br. 11) and the Government's failure to set out the whole of the old Code provision.

Defendants rightly make no "anti-gearing" argument.

2. Neither the Government nor defendants point to a single sentence anywhere to explain the elimination of the gearing words and the independence of Section 6415(c). Indeed, the Government buries in a footnote the fact that both the House and Senate Reports failed to note, by contrast with what they "generally did," that Section 6415 was making "no material change from existing law" (Gov. Br. 13 n.). Here the District Court was correct in saying there is "little in the legislative history" that enlightens our inquiry (206a).

3. Both defendants and the Government run away from the two purposes of Section 7422 that make clear that it was not dealing with all suits against private collectors but was concerned only with suits against the Government and Government officials (Pl. Br. 98).

4. No matter the size of the claims, the fact is that the issues arising under Section 6415(c) of the Code can only be very limited (as the issue is here); there is no monumental

23. The Government and defendants are also in conflict on what Section 6415 covers (and thus legislative history) with the Government saying the section covers a "variety of excise taxes *** including taxes on telephone service, on safe deposit boxes and on admissions and club dues" (Gov. Br. 11) and the Bell System saying that it "applies solely to communications and transportation excise taxes" (Def. Br. 68).

"wrench" involved at all. Moreover, despite what the Government says it will always have its day in court -- either as a defendant or third party-defendant against the private collector or as an amicus if it wants to fight the principle at an earlier stage. The rules for class actions and multi-districting afford ample protection from great numbers of suits. The great "wrenching" to the taxing schemes envisioned by the Government (Gov. Br. 14-18) is imaginative, but ephemeral, stuff.

Conclusion

For the reasons stated in this brief and in our main brief we ask for a reversal of the District Court's opinion with a direction to proceed upon the damage issue under our Reduction Act and antitrust counts (I, III, V, VII, and VIII). In the alternative, we ask for a reversal of the summary judgment dismissing the overpayment counts (II, IV and VI).

Dated: New York, New York
January 31, 1978

Respectfully submitted,

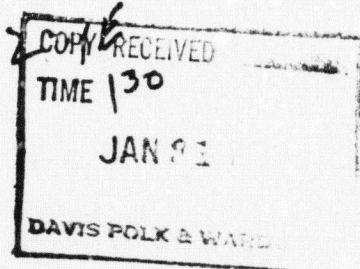
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